91-1821

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ODD ANDERSEN,

Petitioner,

v.

ATLANTIC MARINE CONSTRUCTORS, and
GATES CONSTRUCTION CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was it not a clear violation of this Court's directive in Tipton v. Socony Mobil Oil Co., Inc., 375 US 34, 84 S.Ct. 1 (1963) for the trial court to permit evidence as to the receipt by plaintiff of collateral source benefits (Workers Compensation) for his injuries?

2. Was the Court of Appeals for the Second Circuit wrong in holding that a vessel owner had satisfied its burden of proof that a release signed by a seaman whose injuries ultimately resulted in permanent disability from employment was valid in accordance with the holding of this Court in Garrett v. Moore-McCormack Co., 317 US 239, 63 S.Ct. 246 (1942), and Thompson v. Coastal Oil Company, 352 US 862, 77 S.Ct. 90 (195)?

3. Where the custom of the maritime insurance industry for a half century has

been to use a question and answer type of release, sometimes referred to as a seaman's release or a red letter release, in the settlement of claims with seamen who are not represented by counsel, should not such a release be required in order to protect unrepresented seamen from overreaching and fraud?

4. Did the trial court err in failing adequately to define to the jury the heavy burden on a shipowner to prove the validity of a seaman's release?

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B. This Case Involves an Important Issue of Maritime Law Vital to the Interests of Injured Seamen and Provides an Opportunity for this Court to Speak Definitively on the Question of Validity of Releases Executed by Seamen Unrepresented by Counsel and thus to Eliminate Litigation in the Lower Courts on this Issue. 35

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OPINIONS BELOW

The summary order of the Court of Appeals for the Second Circuit is unreported. It is reprinted in the appendix hereto, at pages A1-3.

JURISDICTION

The summary order affirming the judgment below was filed on January 13, 1992 and issued as a mandate on February 11, 1992.

STATUTES INVOLVED

The Jones Act, 46 USC 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

STATEMENT OF THE CASE

Petitioner, Odd Andersen, was a seaman who was injured working for respondents on a barge which was bobbing up and down in the waters off Sandy Hook, New Jersey. When he was ready to return to work, an insurance adjuster representing petitioner presented him with a check for $6482 and had him sign a paper which he believed to be a receipt. When petitioner later learned that he had in fact suffered a ruptured disc in his lower spine and that he would be disabled for the rest of his life, he commenced suit in Supreme Court, New York County, against respondents.

Respondents removed the case to the United States District Court for the Southern District of New York in 1985. In April, 1991, the case came on for trial before Judge William Enright, a visiting

judge from California, and a jury. Respondents had raised as a defense the release which Andersen had signed in exchange for the $6482 check given to him by the insurance adjuster. During the trial, over objection and in clear violation of the Court's in limine instructions given at the outset of the trial, respondents' counsel introduced evidence that petitioner had filed a Workers Compensation Claim and received compensation when his injuries progressed to the point where they were permanently disabling.

The Court submitted the case to the jury on special interrogatories, the first of which dealt with the release issue. The jury found for the defendants on this issue, ceased their deliberations, and returned a verdict in favor of respondents.

Petitioners appealed to the Court of Appeals for the Second Circuit, which affirmed by summary order filed January 13, 1992.

Because this case involves important issues of maritime law relating to the validity of a seaman's release and with respect to the declaration by this Court in Tipton and in Eichel v. New York Central R.R. Co., 375 US 253, 84 S.Ct. 316 (1963) that evidence with respect to the receipt of collateral source benefits by a seaman or a railway worker is prejudicial and should not be made known to the jury, it merits review by this Court, which has always jealously guarded the rights of seamen.

The Accident

Odd Andersen, a 48-year-old dockbuilder, was working as a crew member on respondents' floating rig (276).* He

*Numbers in parentheses refer to the appendix in the Court of Appeals.

was injured while performing his duties on a pile scow which was bobbing up and down in choppy seas (251). With nothing to hold on to, he was required to carry a heavy chain saw across a load of slippery timbers coated with mud and sap (282). He slipped and injured his back (254). Respondents' insurance adjuster, William Harding, admitted that he did not take statements from any witnesses because they would be unfavorable to respondents (909).

The Injury

At first, Andersen tried to handle his injury without any formal medical treatment (257). He had previously sustained a pulled muscle in his lower back four years before. It had cleared up after two or three weeks of conservative treatment (795-796).

In November of 1982 Andersen started a course of treatment with Dr. Michael Silverman (the same doctor whom he had seen for the 1978 injury.) This treatment, with some interruptions, has continued right up to the present (838).

Petitioner had to stop working sometime in December, 1982 because of increasing back pain. He received various forms of conservative therapy from Dr. Silverman. His condition varied from week to week. At times he was in severe pain. At other times he could function almost normally (808). On March 23, 1983, Dr. Silverman permitted Andersen to return to work. He returned to work in April, 1983, wearing a back support (310). The foreman, Ecklund, was a longtime friend who made allowances for Andersen's residual disability (147-149). He one day in

November, 1983, had to assign heavy physical work to petitioner, using sledge hammers (149-150). This was routine work for a dockbuilder (150), but Andersen had to stop because of severe pain. After that he was kept on light duty until January of 1984, when he quit because he couldn't stand the pain any longer. He has never been able to return to work since then.

In January, 1984, Dr. Silverman ordered a CAT scan of petioner's spine, and referred him to an orthopedic surgeon (825). The CAT scan revealed a herniation of the L5-S1 spinal disc, and a bulging of the L4-L5 disc (825-826). Both doctors agreed that petitioner was suffering from a herniated disc as a result of the accident of October 21, 1982, which is the subject matter of the instant law suit (826,1057). This opinion was further

confirmed by electrical tests on March 20, 1984, which showed extensive nerve damage (830).

Both Dr. Silverman and Dr. Philip Taylor, Chief of Orthopedic Surgery at St. Mary's Hospital (173) testified that although surgery was considered, there were substantial risks involved (193-195), and that it was unlikely that surgery would enable petitioner to return to his former occupation (833).

Dr. Silverman described Andersen's current condition in the following words (893):

> "A. He has--he does not go through a week without some back spasms. He does regular back stretching exercises, generally twice a day, which relieve most of his symptoms. Despite that--and he is on medication, on and off medication throughout. I don't think a month goes by that he's not on some form of anti-inflammatory medication. He has tried to take up painting. He'll stand in one spot, and even that occasionally after a half hour will give him spasm. We had

him on a walking program and most of the time he'll do okay.

Sometimes he'll come back or even have to stop in the middle of the walk and lie down on the grass and do the stretching exercises to relieve the spasm. He has tried to drive distances and has back spasms if he sits in a car seat for too long.

....

Q. Doctor, has, during that entire period of time, given what you know about the patient and the injury that he suffered on October 21, 1982, has there ever been a period of time from January of 1984 right up through the present when you would have recommended that this man return to his usual and customary employment?

A. No.

Q. And have these things that you've discussed that require the monthly medication and the monthly visits and the various forms of therapy, can you tell us whether you have an opinion, Doctor, with a reasonable degree of medical certainty as to whether the requirement for all that treatment and all of that therapy is causally related to the accident of October 21, 1982?

A. Yeah, I do think that all the symptoms and all the treatment are directly related to the original injury.

Q. Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether or not Mr. Anderson is employable at the present time in his usual and customary type of work?

A. No, I think it would--he can never return to his usual and customary work.

Q. What would you say, Doctor, in your opinion, the future holds for Mr. Anderson in terms of his employability with the diagnosis that you've made?

A. Well, I think he'll always have pain; some days yes, some days no. I think that he cannot walk for long distances, and he can't sit for long periods of time. I think that presents a problem in finding a kind of work that he might be qualified to do....

....I think most significant physical labor would be out of the question. Because simply lifting something, a 20-pound object, if he had to do it several times, would probably be difficult for him, and I do think that twisting a reaching frequently and things like that will also be difficult. So it's very difficult to figure out a type of employment that he may be qualified to do."

Edmond Provder, a rehabilitation specialist, conducted tests to determine

Andersen's ability to perform various tasks. He noted (537-9):

> "Throughout the vocational evaluation, Mr. Andersen worked in a steady manner. However, he had to frequently change positions every 30 minutes to relieve his low back pain down both legs. This changing of positions became more frequent, about every 15 to 20 minutes, after one and a half hours of testing. At times it appeared that Mr. Andersen had difficulty concentrating on several of the tasks.
>
> ....
>
> "While working in a seated position, Mr. Andersen sat at the edge of the chair. On tasks involving standing, such as the Bennett hand tool test and the manual dexterity test, he had complaints of low-back pain down both legs after 10 minutes. Mr. Andersen complained of fatigue at the end of this task. After two hours of evaluation, he appeared to become more fatigued and requested several breaks. As Mr. Andersen became more tired his work pace and productivity slowed down.
>
> "In addition he complained of low-back pain down both legs when he sat or stood too long. This pain appeared to increase as the testing session progressed.
>
> "Also, Mr. Andersen had to walk around the room after several tasks to

relieve his low-back pain down both legs.

"Conclusions: Below competitive level rate of production on clerical-type tasks of an unskilled nature, with sedentary exertional requirements.

....

"8. Based on the observations made of Mr. Andersen, during the vocational evaluation, it is my opinion as a vocational expert that he has the following physical capacity: Sit 15 to 30 minutes; stand 10 to 30 minutes; lift and carry 10 pounds and could alternatively perform these movements for three to four hours out of an 8-hour day.

"Summary: Given Mr. Andersen's approaching advanced age, education, past work experience of semi-skilled work, with no transferable skills, the results of the vocational evaluation performed and the observations made while he performed sedentary and light types of work simulation, it is my opinion as a vocational expert that based on these factors he is unable to perform his previous occupation or transfer his skills to other semi-skilled jobs.

"In addition, it is my expert opinion that he is unable to perform any sedentary light or medium work existing in the local or national

economy on a sustained regular competitive basis."

The Adjuster

Robert Harding was a marine adjuster employed by a firm of insurance adjusters, USP&I Agency (890). Harding was a college graduate, who had taken a six-week training course in settlement negotiation given by his employer (893). It was his job to represent the insurance carrier (894). He was later promoted, and became the manager of the agency (890).

Harding conducted an investigation of the case starting in October or November, 1982 (895-896). He interviewed two fellow workers, but didn't take statements from either of them because it would have been "to the company's detriment" (909).

In order to evaluate the case from a medical standpoint, Harding sent Andersen to be examined by Dr. Howard Balensweig, a

doctor whom he had used on a number of occasions (911). Harding received a report from Dr. Balensweig dated January 20, 1983 (913). Dr. Balensweig's clinical impression was:

> "Patient sustained a low back sprain with lighting up of some disc degeneration at L5-S1 and he had some disc bulging clinically...." (429)

Harding also received a report from the treating doctor, Michael Silverman, dated January 25, 1983, which said:

> "....There is evidence of bilateral sacroiliac strain and spasm with left-sided neuritis and the prognosis must remain guarded at this time." (912)

Harding also had a report from a neurologist, Dr. Bender, which indicated that a diagnosis of herniated disc could not be excluded (915), but he never sent petitioner a copy of any medical report.

Harding told Andersen that while he was disabled and receiving medical care

for his injury, he was entitled to maintenance at the rate of $8 per day (906,924). This advice was not true; there was no contract, and thus the rate should have been the reasonable cost of room and board. c.f. Incandela v. American Dredging, 659 F 2d 11 (2 Cir. 1981).

Andersen had never dealt with a lawyer before, other than for a workers compensation claim (262). He had never before signed a general release (307).

The Release

When Dr. Silverman permitted petitioner to return to work on March 23, 1983, Harding calculated Andersen's net lost earnings at $10,102, subtracted the weekly payments already made, and obtained a check for $6482 (919), which he took to the Andersen's home, along with a release

which had already been notarized (922-923) Odd and Doris Andersen signed this document, thinking it to be a receipt (68-69, 306-307, 88-89). They never read it, else they would have noticed that their address was incorrect (113).

There was no doubt in Harding's mind that this was a Jones Act case (896). His office had a special form of seaman's release, sometimes called a "red letter" release, for use in seamen's cases (922). This form of release required the seaman to answer a number of questions acknowledging that his rights have been fully explained to him. Harding's employer, USP&I Agency, required this red letter seaman's release even when a seaman is represented by an attorney.

For reasons best known to Robert Harding, the release which he brought to

the Andersen home in Norwood, New Jersey, on the evening of March 23, 1983, required nothing more than the signatures of Odd and Doris Andersen. It already bore the signature of a notary who swore falsely that the document had been executed in her presence (922-923). The Andersens signed this document believing it to be a receipt without the vaguest understanding of what rights Odd Andersen had to sue respondents (307-308), much less having any idea that they were relinquishing such rights by signing the paper placed before them by Harding.

Harding could not remember having explained to petitioner any of his legal rights other than the right to have all of his medical bills paid, and to receive maintenance at the rate of $8 per day (906-907). He specifically denied having told

Andersen anything about the doctrine of unseaworthiness (907), though such doctrine was clearly applicable to petitioner's case. c.f. Seas Shipping Company v. Sieracki, (1946), 328 US 85, 66 S.Ct. 872.

Evidence of Receipt
of Compensation Benefits

When Andersen had to stop working a year after his injury, he was working for a different company, Yonkers Construction. He applied for, and received, workers compensation benefits from Yonkers. Realizing the tremendous potential prejudice such evidence would have with the jury, plaintiff's counsel made an in limine application to the trial judge prior to jury selection (34), relying on the decisions of this Court in the cases of Tipton v. Socony Mobil Oil Co., Inc.,

supra, 375 US 34, 84 S.Ct. 1 (1963) and Eichel v. New York Central R.R. Co., 375 US 253, 84 S.Ct. 316 (963). Defense counsel appeared to agree:

> "....I believe I did read the two cases that were cited by Mr. Matthews and I agreed with him basically they hold that collaterally we cannot use the fact the man has applied for compensation to show he is not a seaman. I agree with you on that. The question whether he has received money, which he has, and it is a question of fact on this second accident he has received compensation, and so forth and so on." (35)

The Court said:

> "You should plan that evidence not coming before the trier of the facts unless you can show me some authority, Mr. Giuffra, that says you can...." (35)

Defense counsel never offered any such authority to the trial court, but nonetheless boldly violated this agreement without so much as a warning. Indeed, it was his very first area of inquiry on cross-examination of plaintiff (318):

"Q. A few minutes ago you were talking about that you got injured when you were working for Yonkers Construction, is that correct?

A. I reinjured myself, yes.

Q. And that's on November 16, 1983?

A. Yes.

Q. And that was at a point when you were working with the sledgehammer, is that correct?

A. Yes.

Q. As a result of that incident, did you bring any claim against Yonkers?"

Petitioner's counsel, scarcely able to believe his own ears, called to the Court's attention defense counsel's blatant violation of the in limine agreement (319), but the Court now reversed itself, and said (320):

> "Now, I think it's perfectly proper for him to ask if it was the subject of a claim in which compensation was paid, and that's the end of the inquiry....I'm not letting in collateral source, payments or anything else. The nature of the fact tht he had filed a claim and this was

> a compensation paid and it's germane. Throughout the case the plaintiff has talked about reinjuring the back and the focal point of January (sic) 1982 and the fact that this was a separate claim and separately treated and I'll permit the limited inquiry that he filed a claim and it was paid by Yonkers."

Petitioner's counsel, outside of the presence of the jury, moved for a mistrial. The motion was denied (408).

The Appeal Below

The jury answered the first interrogatory, finding that respondent had proved that the release signed by the Andersens on March 23, 1983, was valid and binding. They terminated their deliberations, and judgment was entered in favor of respondents. Petitioner appealed to the Court of Appeals for the Second Circuit, claiming several prejudicial

errors. These fell into three broad categories:

1. Failure to direct a verdict in favor of plaintiff on the release issue.

2. Failure properly to instruct the jury on the law with respect to seaman's releases.

3. Errors with respect to admission of evidence prejudicial to the plaintiff, the most glaring of which was the introduction of evidence of the receipt of compensation benefits, in direct violation of the rule set forth by this Court in Tipton and in Eichel.

The Court of Appeals affirmed the judgment below in an unpublished summary order (A1-A3). It refused to consider assignments of error regarding evidentiary rulings, saying (A3):

> "The district judge properly instructed the jury not to consider any further issues if it determined that the release was valid. The verdict is supported by the evidence. Therefore, we need not address the additional points raised by Andersen."

REASONS FOR GRANTING THE WRIT

A. If the decision below is allowed to stand, the result will be a complete emasculation of the principles set forth by this Court in Tipton and Eichel.

Tipton v. Socony Mobil Oil Co., supra, 375 US 34, 84 S.Ct. 1 (1963) was a Jones Act case in which the jury, as in the instant case, never reached the issues of liability and damages because it found for defendant on a preliminary issue, that of whether or not the plaintiff was in fact a Jones Act seaman (an issue likewise raised by respondents in the instant case). The trial court admitted evidence that plaintiff had applied for and received workers compensation. The Court of Appeals for the Fifth Circuit unanimously held it error to have admitted the evidence of other compensation benefits but, with one judge dissenting, found the error harmless.

315 F 2d 660,662. This Court reversed, finding that the error could not properly be deemed harmless.

This Court has recently cited Tipton with approval, Southwest Marine, Inc., v. Gizoni, 60 USLW 4020. Respondent would distinguish Tipton on the basis that the jury never reached the Jones Act issue in our case. This argument might be persuasive, were it not for the fact that two months after the decision in Tipton, this Court rendered its decision in Eichel v. New York Central R.R. Co., supra, 375 US 253, 84 S.Ct. 316 (1963).

Eichel involved the issue as to whether receipt of collateral source benefits could be presented to the jury where the fact of such receipt might be relevant with respect to other issues in the case. The Court of Appeals had

concluded that the disputed evidence should have been admitted because:

> "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will....create substantial danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings" 319 F 2d at 20.

Said this Court, 375 US at 255:

> "We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice...."

In Andersen's case, there was other evidence that he had attributed his disability to the incident when he was working for Yonkers (1064). The effect of the proof of receipt of compensation could only have the extremely prejudicial effect of notifying the jury that Andersen had

already made a claim and received money from someone else, without its knowing that such money would have to be paid back.

This Court said in Eichel, 375 US at 255:

> "We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. Tipton v. Socony Mobil Oil Co., Inc., 375 US 34. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact...."

A case on all fours with the instant case is Bourque v. Diamond M. Drilling Co., 623 F 2d 351 (5 Cir. 1980). Bourque sued under the Jones Act for an injury to his knee while working on a drilling barge. A few weeks later, while working for another employer, he stooped down and felt his knee pop. He thereafter received Workers

Compensation benefits from the second employer. The Court of Appeals for the Fifth Circuit, citing both Tipton and Eichel, held that the jury should not have been told of the compensation benefits paid by the later employer.

Many courts have recognized the fact that if a jury learns that an injured person has received compensation, there is less likely to be a tort recovery. See Shroeder v. Pennsylvania Railroad Company, 397 F 2d 452 (7 Cir. 1968), (verdict for defendant, judgment reversed because of admission of evidence that plaintiff received Workers Compensation); LaMade v. Wilson, 512 F 2d 1348 (D.C. Cir. 1975), (defense judgment reversed because of prejudicial impact of admitting evidence of compensation); Doucet v. Gulf Oil Corp., 783 F 2d 518) (5 Cir. 1986), rehearing

denied 788 F 2d 250, cert. denied in 479 US 883. (Defense judgment reversed when court instructed jury concerning plaintiff's entitlement to workers compensation, though plaintiff's counsel did not object when instruction initially given at outset of trial, only objecting after jury charge given.)

See also Simmons v. Hoegh Lines, 784 F 2d 1234,1237 (5 Cir.1986):

> "....juries will be more likely to find no liability when they are aware that the plaintiff has already received compensation. The prejudicial effect of compensation evidence affects the liability determination as well as the damages determination...."

In Mangan v. Broderick and Bascom Rope Company, 351 F 2d 24 (7 Cir. 1965) cert.denied 383 US 926, as in Andersen's case, there was an in limine application prior to commencement of the trial, and the trial judge expressed his general view

that evidence of compensation benefits would not be admitted, and told defense counsel to refrain from such inquiry until a ruling was made. (In Andersen's case, defense counsel consented to the in limine application.) Notwithstanding the court's admonition, defense counsel persisted in inquiries on the subject of compensation during his cross-examination of witnesses until the trial judge ultimately permitted the inquiry--ostensibly to show the bias of the witness.

The court of appeals reversed, saying (351 F 2d at 29-30):

> "This court, among others, has stated that testimony of that nature is highly prejudicial to the plaintiff's case....
>
> "...even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here with gross error. Counsel's willingness to inject that evidence into the case at any cost is

sufficient to earn him a new trial for plaintiff."

....

"Any slight value which such evidence might have in discrediting a witness is far outweighed by the likelihood that such evidence will be misused by a jury....Indeed, we can conceive of few instances in which the value of such evidence would merit the effort of its producement if the evidence did not at the same time advise the jury that the plaintiff had already collected some money for his injury. As one court pointed out the 'smell' of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause. Burnett v. Hernandez, 9th Cir., 263 F 2d 212, 214."

Some state legislatures have become sufficiently concerned about the prejudice to personal injury plaintiffs that they have passed legislation forbidding the receipt in evidence of the fact that an injured plaintiff has received compensation benefits. cf. ORS 656.324(2) (Oregon), Burnett v. Hernandez, supra, 263 F 2d 212

(9 Cir. 1959). See also, Southern v. Plumb Tools, A Div. of O'Ames Corp., 696 F 2d 1321 (11 Cir. 1983) (Alabama).

In the latter case, in reversing a defense verdict because a jury was allowed to learn that plaintiff had received workmen's compensation benefits, the court said (696 F 2d at 1323):

> "Even in the ordinary case, a procedural rule permitting an intervenor or defendant to show the plaintiff has received workmen's compensation benefits from his employer would undermine the substantive collateral source doctrine because such evidence is considered unquestionably prejudicial to the plaintiff's case. Eichel v. New York Central Railroad, 375 US 258, 84 S.Ct. 316, 11 L.Ed. 2d 307 (1963) (prejudicial to plaintiff in suit brought under Federal Employers Liability Act to admit evidence he received disability payments under Railroad Retirement Act); Tipton v. Socony Mobil Oil Co., 375 US 34, 84 S.Ct. 1, 11 L.Ed. 2d 4 (1963) (reversible error to admit evidence of benefits paid under Longshoremen's and Harbor Worker's Compensation Act in suit brought under Jones Act.)"

The Tipton and Eichel cases present a clear and unmistakable pronouncement by this Court that evidence of a Jones Act seaman's receipt of compensation benefits shall not be brought to the attention of the jury, and that violation of this interdiction is reversible, prejudicial error requiring a new trial.

The Fifth, Seventh, Ninth, Eleventh and D.C. Circuits have all confronted this question and found themselves bound by Tipton and Eichel to exclude any evidence of receipt of compensation benefits by an injured party. This case puts the Second Circuit totally out of step with the other circuits. This fact alone justifies granting of the writ.

B. This case involves an important issue of maritime law vital to the interests of injured seamen and provides an opportunity for this Court to speak definitively on the question of validity of releases executed by seamen unrepresented by counsel and thus to eliminate litigation in the lower courts on this issue.

This Court has shown no inclination to depart from its long-established solicitude for seamen. It has clearly and frequently pronounced that seamen remain wards of the Court. U.S. Bulk Carriers v. Arguelles, 400 US 351,355, 91 S.Ct. 409,411-412 (1971); Cox v. Roth, 348 US 207,209, 75 S.Ct. 242,243 (1955); Garrett v. Moore-McCormack Co., 317 US 239, 63 S.Ct. 246 (1942).

No reported decision of this Court has ever upheld a release signed by an unrepresented seaman as barring his right to have a jury determine the merits of his

Jones Act claim. Thirty-seven years ago, in the case of Thompson v. Coastal Oil Co., 352 US 862, 77 S.Ct. 90 (1955), the Court reversed the dismissal of a seaman's complaint by the Third Circuit, 221 F 2d 559 (3 Cir. 1955). In Thompson, there was no doubt that the seaman fully understood the nature of the document which he was signing. There were two factors involved in Thompson, the accuracy of the medical prognosis and appraisal as to the liability. Thompson had settled for $4,000--roughly the equivalent of $16,000 in 1983 dollars or $20,000 today. The trial judge awarded an additional $16,000 in damages, finding that the insurance adjuster had innocently misrepresented the weakness of the liability of the case because at the time of the settlement the landmark case of Keen v. Overseas Tankship

Corp., 194 F 2d 515 (2 Cir. 1952) cert. denied 343 US 996, 72 S.Ct. 1061, had not yet been decided, and the adjuster thought that the doctrine of unseaworthiness did not apply to the viciousness of a fellow crew member. Thompson v. Coastal Oil Co., 119 F.Supp. 838,842.

The release signed by Andersen is much more suspect than the one in Thompson's case. One fundamental difference, of course, is that the format of the release itself lends itself to the probability of fraud. It was admittedly notarized falsely in advance by a notary who had never met petitioner. It did not contain questions for petitioner to answer in order to assure that he was aware of his rights. Since it only required a signature, it could easily be mistaken for a receipt.

The consideration for the release consisted solely of the amount which the adjuster Harding calculated to be net lost earnings during the period of petitioner's disability from work, after subtracting certain "advances" made at the rate of $125 per week to supplement maintenance and cure benefits which Harding had falsely represented to Andersen as being payable at the rate of $8 per day, or $56 per week. Since a rate of $181 per week was ultimately stipulated to for maintenance, the actual check of $6482 was really substantially less than petitioner's net lost wages. Of course, it included nothing for pain and suffering or permanent injury, or for the catastrophic loss of future earning capacity which ensued when the injury turned out to be far different and more severe than anticipated.

Andersen had no reason to expect that the future effects of his injury might be so devastating. He was never provided with a copy of any of the medical reports received by Harding, which mentioned the guarded prognosis and the possible disc involvement. Andersen certainly never contemplated that the injuries sustained by him were of such a nature that future disability was likely to ensue. Harding apparently did not think so, either, for the so-called "settlement" check was admittedly in an amount less than petitioner's lost earnings up to that date. Many cases have held that the fact that the amount of a settlement is not very much more than the wage loss is an indication that the parties did not consider that the injuries would be troublesome in the future. See Taylor v. Chesapeake and Ohio

Railway Company, 518 F 2d 536 (4 Cir. 1975); Jaynes v. Louisville and Nashville Railroad Company, 560 F.Supp. 57 (E.D.Tenn. 1981); Thompson v. Camp, 163 F 2d 396 (6 Cir. 1947).

The difficulty in diagnosing a herniated spinal disc is perhaps reflected by the large number of cases where a release has been signed by a claimant who was unaware at the time that he had suffered such an injury. c.f. Taylor, supra; Graham v. Atchison, Topeka & Santa Fe Railway Co., 176 F 2d 819 (9th Cir. 1949); Chicago & N.W. Ry. Co. v. Curl, 178 F 2d 497 (8 Cir. 1949). Indeed, in the Curl case there was a dispute between the experts as to whether or not there was a disc injury, but the court said, (178 F 2d at 501-502):

> "In order to establish mutual mistake in the execution of a release fatal to its validity it was not

> necessary, as appellant contends, that appellee show the exact and particular nature of the injury received by him. Appellee was not under the burden of proving with absolute certainty that he suffered from a prolapsed cervical disc. It was only necessary that he produce evidence which, read in the light most favorable to him, supported a finding of the jury that at the time of the release appellee was suffering from a substantial and severe injury from which, at best, recovery was doubtful, and that the release was given in the mistaken belief on the part of appellee and appellant, honestly but erroneously held, that appellees injury was not permanent nor serious, but on the other hand of a minor character from which his complete and early recovery was certain."

This Court held that Thompson's release was properly set aside when the adjuster innocently misrepresented the strength of the liability for unseaworthiness. Here, Harding admitted that he never even advised the petitioner as to the existence of the doctrine of unseaworthiness (907). Further, since Harding opined under oath that the

liability in the case, from petitioner's point of view was not strong (269-270), despite the fact that he took no statements from witnesses because they would be unfavorable to respondents (909), it is clear that Harding never told Andersen that the case was indeed very strong.

Following the decision of this Court in Garrett, the Court of Appeals for the First Circuit had occasion to discuss the minimum requirements for sustaining a defendant's burden of proof with respect to a release signed by a seman who was not at the time represented by counsel. In Bay State Dredging & Contracting Co. v. Porter, 153 F 2d 827 (1 Cir. 1946), the Court of Appeals affirmed the action of the trial court in refusing to submit to the jury a release executed by a seaman

whose rights were not fully explained to him:

> "...bearing in mind that the insurance agent was negotiating with a seaman who was without benefit of counsel, we think that agent was under an obligation to bring home to the plaintiff an understanding of the rights he was giving up in exchange for the settlement offered. Otherwise, the plaintiff would necessarily not be in a position to make an intelligent decision as to whether the offer should be accepted. At the very least he should have been told that he had an unbeatable right of action under the maritime law for maintenance and cure, not dependent on proof of negligence; and that in addition he had, under the Jones Act, a right to maintain an action at law for damages for injuries resulting from the negligence of any of the officers or employees of the defendant, in which action the amount of recovery was not subject to statutory maximum limits..."
> 153 F 2d at 833.

This case was decided before this Court enunciated the doctrine of unseaworthiness in the landmark case of Seas Shipping Company v. Sieracki (1946), 328 US 85, 66 S.Ct. 372, and before Judge

Weinfeld held in Rodriguez v. Coastal Ship Corporation, 210 F.Supp. 38 (SDNY 1962), that such doctrine applies even to unpreventably dangerous conditions.

In terms of the result in Andersen's case, it does not matter whether Harding said nothing about unseaworthiness, as he admitted (907), or whether he said something about it without in any way explaining what the doctrine was (930-932) or that petitioner had a very strong case. Bay State Dredging & Contracting Co. v. Porter, supra; Thompson v. Coastal Oil Company, supra, 352 US 862, 77 S.Ct. 90 (1955); Rider v. Sprague Steamship Company, 149 F.Supp. 949 (D.Mass.1955). In either event, respondent did not satisfy its burden of proof.

The leading treatise on seaman's rights notes:

> "...The obligation is placed upon the shipowner, his claim agents, doctors and attorneys to make clear to the seaman, prior to accepting his release, the nature and seriousness of his ailment, its effect on his ability to work and on his earning power, and to advise him of his rights under the Jones Act, the general maritime law and other laws affecting the seaman's remedies."
> Norris, The Law of Seamen
> (1970 Ed.) §501, p. 593

In the instant case, the jury was never able to evaluate to what extent petitioner had been informed as to his rights, or the true inadequacy of the $6482 check, because the trial court refused to instruct the jury as to a seaman's right to maintenance and cure. Petitioner's counsel submitted a proposed charge defining those rights as to which a seaman must be advised, but the Court refused to submit this instruction to the jury (998), having described it as "practically a directed verdict for the plaintiff" (935).

But plaintiff's request to charge #21 (A4) accurately set forth both petitioner's claim and the ruling case law. That the trial court viewed it as "practically a directed verdict" only reflects the weakness of the release defense. Indeed, the Court should have directed a verdict for petitioner on this issue, on which respondents bore a justifiably onerous burden of proof, perhaps best described by the language of Mr. Justice Story 169 years ago:

> "Every court should watch with jealousy an encroachment on the rights of seamen...the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable...."

Harden v. Gordon, 1823,
Fed. Cas. No. 6,047

One hundred twenty years later, Justice Hugo Black, writing for a unanimous court, cited Justice Story's opinion in holding that a shipowner who relies on a general release obtained from an injured seaman bears the heavy burden of showing that such release was made by the seaman with a full understanding of his legal rights. Garrett v. Moore-McCormack Co., supra, 317 US 239, 63 S.Ct. 246 (1942).

It is ironic that by quoting from the Garrett opinion, without further explanation, the district judge gave a charge to the jury in Andersen's case which was both inadequate and misleading. The Court's initial charge was as follows (670-671):

> "The defendants have pleaded as a complete defense to the claim being asserted by the plaintiff that a general release for an adequate

> consideration was signed by the plaintiff. The signing of the general release will prevent the plaintiff from obtaining any recovery against the defendant in this action. Factors which must be considered by you in order to determine the validity of the defense includes whether the plaintiff was fully advised of his rights, whether he had a full appreciation of the settlement consequences at the time of the signing of the release, whether it was supported by adequate consideration and, furthermore, whether plaintiff was informed of his medical condition.
>
> "If you, as jurors, find that the defendants have established to your satisfaction these issues, then your verdict must be in favor of the defendants and you need not consider any questions dealing with negligence or unseaworthiness."

This charge was inadequate in that it contained no explanation of what the rights were of which plaintiff was to be fully advised. To compound the inadequacy, the charge was given on the afternoon of April 18, and the jury did not start its deliberations until the following morning. The jury was provided with tape recorder

and an audiotape of the court's charge (878).

At 12:20 on April 19 the court received the following note (690):

> "Your Honor, having played back the tape of your charge regarding the points that must be satisfied, regarding the validity of the release, we want to know the meaning of your point 3: 'supported by adequate consideration.'
>
> "Additionally, must all four points be satisfied, that is, agreed upon, in order to find the release valid and binding? If all six do not agree on a Yes or no, how do we answer question number 1 on the special verdict form?"

Petitioner's counsel suggested that the jury should be instructed that all four of the points must indeed be satisfied in order to sustain the release (695), and requested that the court reconsider its refusal to give plaintiff's requested instruction 21. The court refused (698).

The court also refused to give a direct response to the jury's inquiry

concerning whether all four points must be satisfied, choosing instead to read the following language from the Garrett case (713):

> "The burden is upon one who sets up a seaman's release to show that it was executed freely without deception and that it was made by the seaman with full understanding of his rights. Adequacy of the consideration and the nature of the medical advice available to the seaman at the signing of the release are relevant to an appraisal of his understanding."

Petitioner's counsel strongly objected to the court's supplemental charge and to the court's failure to answer the jury's questions (724-726). Specifically, objection was made to the failure to tell the jury that where a seaman is not represented by counsel there is a duty on the part of the adjuster to explain his rights to him (725). Counsel for respondent had argued to the jury, based on evidence improperly received (936,937,294)

that Andersen was an experienced claimant who must have been familiar with his rights as a seaman (588). In fact, Andersen never had a maritime claim before (261) and only had an attorney once before, in connection with a compensation case when he hurt his ankle on the job (262). But the jury could not be expected to understand the distinction without any instruction by the court as to the difference between compensation and maintenance. Petitioner's counsel had drafted just such an instruction and had submitted it to the court, but it was refused (983,28).

Since the jury had expressed its uncertainty on the subject, the court should have stated unequivocally that the release could not stand absent a showing that Harding fully advised Andersen what his rights were, and that he would be

giving up these rights by signing the paper.

Furthermore, the new instruction diluted the requirement that petitioner be fully informed as to his medical condition, substituting the amorphous phrase "the nature of the medical advice available to the seaman". The latter may be fine language for a judicial opinion, but it will not pass muster as a clear jury instruction. What does "available" mean? Does it mean that Andersen had a duty to request all of his medical reports from Harding? That certainly is not the law. It was Harding who should have told petitioner about the guarded prognosis mentioned by Dr. Silverman, and the possible disc involvement mentioned by Dr. Bender and Dr. Balensweig. If Andersen had any idea what the future held for him,

there was no way he would have accepted a settlement for an amount less than his lost wages. But of course he did not know that he was settling anything other than the amount of his lost wages.

Adding to the jury's confusion was the court's failure to define the term "consideration". Although the meaning of this word is clear enough to every law student who took a course on the law of contracts, it is scarcely a term used in common parlance by lay jurors. The court refused to provide the jury with a definition, as requested by petitioner's counsel (696,724).

The charge on the release defense, and the court's response to the jury's questions, failed to provide the jury with sufficient guidance so as to make a determination in accordance with ruling case law.

C. By requiring that a release executed by a seaman who is not represented by an attorney to be either properly notarized or else be a "red letter" release, this Court could eliminate fraud, reduce litigation, and protect seamen.

The Federal Reporter is full of cases where claimants have signed releases, thinking them to be receipts. See, for example, Bartholomew v. Universe Tankships, 168 F.Supp. 153 (SDNY 1957), Ricketts v. Pennsylvania R. Co., 153 F 2d 757 (2 Cir.1946), and various cases collected, 43 ALR 2d 786-807.

More than 50 years ago, the maritime insurance industry and its attorneys devised an instrument designed to eliminate any ambiguity as to the nature and effect of a seaman's release. Two years before the decision of this Court in Garrett, the Second Circuit upheld as binding a form of

seaman's release which has come to be known as a "red-letter" release. Sitchon v. American Export Lines, 113 F 2d 830, 831 footnote 1 (2 Cir. 1940). The release, besides containing specific warnings as to its legal consequences, requires the seaman to write out in his own handwriting the answers to six questions. In effect, it eliminates the risk of an unscrupulous insurance adjuster obtaining a seaman's signature by making him believe that he is only signing a receipt.

In Hume v. Moore-McCormack Lines, Inc., 121 F 2d 336 (2 Cir. 1941), in a scholarly opinion which presaged Garrett, Judge Frank at page 337 described the red letter release in concise terms as "signing his life away".

Another court described the contents of this type of release as a "sort of

Miranda warning". Cates v. Unites States, 451 F 2d 411,413, footnote 6 (5 Cir. 1971).

Harding admitted that Andersen's case was a Jones Act case (896) and that his office had red letter releases for use in seamen's cases (922) (A5). Nonetheless, Harding left his office to go to the Andersen home carrying with him a different type of release, with no such safeguards (1065) (A6). When he left this office, the release had already been falsely notarized by a notary in his office (923).

No one other than Harding witnessed the signing of the release. The Andersens swore that Harding told them that the document was a receipt. The jury was forced to resolve this swearing match--a situation where the opportunity for fraud and deception had been created by Harding's choice of the less effective release. The

jury inquired as to the legal effect of the false notarization. Neither party could suggest to the court any legal precedent.

Petitioner now urges that this Court declare that such a release as this--requiring nothing more than a signature--witnessed only by a professional adjuster who is dealing with an unrepresented seaman, and falsely attested to by a notary, is void.

D. Petitioner did not receive a fair trial.

The entire case revolved around the issue of the release. There was little, if any, dispute as to how the accident occurred, and the evidence of unseaworthiness was overwhelming. Harding's job was to investigate the claim and to settle it on terms that were as favorable as possible to the insurance company. He interviewed witnesses, but did not take statements because they would not have been favorable to respondents (909). He obtained medical reports, but did not share them with petitioner (912). He misrepresented the rate of maintenance and cure (924). He unilaterally calculated Andersen's net wage loss, made deductions based in part on the incorrect maintenance rate, and prepared a check based solely on his own calculations.

He then selected a form of release not generally used for a seaman's case, had this release falsely notarized before he left his office, and set out for the Andersen's home, where he obtained the signatures of Odd and Doris Andersen, under circumstances where the Andersens believed they were merely signing a receipt for lost wages.

The entire outcome of the case hinged on the conduct of this man who represented respondents' interests at all times. Nonetheless, the trial court permitted respondents' counsel to ask leading questions of this witness on vital issues (930-937), permitted reading of portions of his testimony by respondents' counsel during petitioner's case with no showing of the witness' unavailability, and refused

to instruct the jury that he was an interested witness (569).

Harding represented the insurance carrier at all stages of the claim (895) ultimately obtaining a release in favor of both respondents and the insurance carrier (1065). In all respects, he was the alter ego of the real party in interest in the case, and petitioner should have been permitted to impeach him by evidence of his bias and motivation. Instead, important questions designed to bring out the witness' motivation to obtain a small settlement were disallowed as being "collateral" (297).

During discovery, Harding was produced for a deposition by respondents. The deposition was recorded on videotape. Petitioner's counsel could not anticipate that the defense did not intend to call

such a vital witness at the trial. He therefore, with the encouragement of the court (297) prepared an edited videotape of those portions of Harding's deposition which he wished to present as part of his case in chief. This consisted for the most part of some factual background, and two important admissions:

> (1) that he could not remember telling Andersen about any rights other than his right to have an attorney and his right to receive maintenance and cure (906-907);
>
> (2) that he never told Andersen about the doctrine of unseaworthiness (907).

Respondent's counsel then asked the witness:

"Q. ...Now, when you had the conversations with Mr. Andersen, you know, when you initially met him and the subsequent conversations, did you tell him that, under the Jones Act and the Maritime Law of unseaworthiness, that he had a right to bring an action for personal injuries against his employer?

MR. MATTHEWS: Objection to form (930-932).

Allowing such a leading and suggestion question was particularly prejudicial because it dealt with an essential element of Gates' defense--the duty of the adjuster to advise the unrepresented seaman of his rights. However, the answer did not spell out the discharge of that duty.

Equally prejudicial was permitting Harding to testify about the contents of various insurance industry reports purporting to list prior claims, over objection:

> "...when I received the Central Indexz Bureau Report-he had worked--it showed he had worked for prior construction companies in--as a dockbuilder and it showed he had prior back injuries" (937).

This inadmissible hearsay provided the basis for defense counsel's argument that Andersen was an experienced claimant.

Nor did the hearsay stop there. Harding was permitted to testify to

conversations with Dr. Silverman in which the doctor is purported to have said that he had been treating Andersen for a number of years for the lower back strain.

"Q. And this was a continuation of the same condition?

A. Yes."

It should be remembered that all of the above testimony was received during plaintiff's case from a witness whose absence was never explained, though he lived and worked nearby. The cumulative effect was very prejudicial.

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted. Petitioner respectfully suggests that summary reversal and a new trial may be appropriate.

Respectfully submitted,

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DECISION OF THE COURT BELOW

SDNY

85cv9141

ENRIGHT

(TMJ)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of January, One thousand nine hundred and ninety-two.

P R E S E N T:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

Circuit Judges.

Docket No. 9107545

ODD ANDERSEN,

Plaintiff-Appellant,

v.

ATLANTIC MARINE CONSTRUCTORS, and
GATES CONSTRUCTION CORP.,

Defendants-Appellees.

This is an appeal from a judgment entered on a jury verdict in favor of defendants-appellees in the United States District Court for the Southern District of New York, Enright, J., United States District Judge for the Southern District of California, sitting by designation. Odd Anderson, who injured his back when he slipped on pilings while aboard defendant's barge, challenges the jury charge and several rulings of the district court.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is AFFIRMED.

Appellant argues that the evidence on the release was such that a directed verdict in his favor was in order. He argues, in essence, that reasonable men could not have differed on the validity of the release. We disagree.

Under Fed. R. Civ. P. 50, a directed verdict is proper where there is insufficient evidence to support a verdict in favor of the non-moving party, that is, where "there can be but one conclusion as to the verdict that reasonable men could have reached." Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970) (citations omitted). "Since grant of one of these motions deprives the party of

a determination of the facts by a jury, they should be cautiously and sparingly granted." 9C. Wright & A. Miller, Federal Practice and Procedure § 2524, at 542. In ruling on a request for a directed verdict, a judge must view the evidence most favorable to the party against whom the motion is made and give the party the benefit of all reasonable inferences from the evidence. See id. at 543-45. Our role on appeal is the same as that of the trial court. See O'Connor v. Pennsylvania R. Co., 308 F.2d 911, 914 (2d Cir. 1962).

In Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), the Supreme Court set forth the standard for analyzing releases signed by seamen:

> [T]he burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.

Id. at 248. At trial there was evidence that the release was explained to Andersen, and that he possessed sufficient education and intelligence to understand its effect. Moreover, the defendant introduced testimony on the extent, nature and source of Andersen's injuries and on the adequacy of the consideration that Andersen received. In light of this, we do not believe that the district court erred by allowing the jury to decide the validity of the release.

Andersen also argues that the court's instruction to the jury constituted error, as it did not illustrate the heavy burden on the shipowner in a seaman's case. The district court's charge incorporated Garrett's language, however, and we do not believe that this was in error.

The district judge properly instructed the jury not to consider any further issues if it determined that the release was valid. The verdict is supported by the evidence. Therefore, we need not address the additional points raised by Andersen.

William H. Timbers, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Amalya L. Kearse, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ODD ANDERSEN,

Petitioner,

v.

GATES CONSTRUCTION CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT GATES CONSTRUCTION CORP. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a jury's fact bound finding that a general release was valid and binding.

2. Whether the summary, unpublished judgment order of the United States Court of Appeals for the Second Circuit, created a conflict with other circuits that have considered this Court's decisions in Tipton v. Socony Mobil Oil Co., Inc., 375 U.S. 34 (1963) and Eichel v. The New York Central R.R. Co., 375 U.S. 253 (1963).

STATEMENT UNDER RULE 29.1

Respondent does not have a parent corporation or subsidiaries (except wholly owned subsidiaries).

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IN THE SUPREME COURT OF THE UNITED STATES
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GATES CONSTRUCTION CORP.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, GATES CONSTRUCTION CORP.

OPINION BELOW

A summary unreported judgment order was issued by the Second Circuit Court of Appeals (PET Appendix A1-A4).

JURISDICTION

The summary order affirming the judgment of the district court dismissing the complaint was filed on January 13, 1992 and issued as a mandate on February 11, 1992. The petition for a writ of certiorari was docketed in this Court on April 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case presents no questions of national importance requiring this Court's review. In its decision below, the Second Circuit Court of Appeals affirmed the finding of fact by a jury that Petitioner had entered into a valid and binding general release.

The Second Circuit's wholly fact bound decision has not created a conflict among the circuits. In addition, the Second Circuit's disposition of an appeal has no precedential value. Second Circuit Rule 0.23.

Absent any indication to the contrary it must by presumed that the Court followed circuit precedent and determined the issues based on precedent.

This Court should not waste its limited resources reviewing the petition. None of the requirements of Rule 10 of this Court have been met by the Petitioner.

COUNTER-STATEMENT OF THE CASE

Petitioner, Odd Andersen, a harbor worker whose particular trade was that of a dock builder filed this action to recover damages for personal injuries allegedly sustained on October 21, 1982. Petitioner belonged to the dock builders union and had been employed in this trade for over twenty-four (24) years and considered himself to be a dock builder not a seamen (330,339)[1].

In October of 1982, Petitioner was employed on a per diem or hourly basis by Respondent, Gates Construction Corp. Petitioner and a number of other dock builders had been hired to work at a construction site approximately 100 yards off Sandy Hook, New Jersey (331, 381-382).

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[1]Numbers in parentheses refer to the Appendix in the Court of Appeals.

Petitioner commuted to the off shore job site by car pool. He was then transported to and from the construction site at Sandy Hook by means of a launch. Petitioner was not required to operate the launch nor was he a member of her crew (335-336).

The off shore job site was a work platform or artificial island known as "Jack-Up Barge 113". The barge was equipped with legs or spuds which when fully extended was transformed from a floating barge into what the United States Coast Guard classifies as an "artificial island" (336-337 and 400-401). This artificial island provided a stable work platform which did not shift or move with the wind or currents (336).

In addition, to the Barge 113, there was a scow tied up along side the Barge 113. This scow was used to store wooden pilings

which were being utilized at the job site (334, 340, 345-347). The dock builders had no role in moving either the Barge 113 or the scow (370). Respondent had employed seamen who were responsible for moving the scow and the Barge 113. A tugboat was required to move the Barge 113 beyond the length of its anchor chains (370, 372-375).

Petitioner and other members of his crew were employed to drive the pilings, stored on the scow, into the seabed. Respondent was hired to create a mooring for vessels at the Sandy Hook location (331-332). On October 21, 1982, Petitioner was assigned the responsibility to trim the end of the wooden pilings. In order to do this a chainsaw was supplied. Petitioner claims that it was necessary to walk over "wet and muddy" pilings in order to cross from one end of the scow to the other (252). Respondent on

the other hand, introduced evidence that Petitioner had another alternative route available. The alternate route was that Petitioner could have walked along the perimeter of the scow. By using the perimeter, the Petitioner would have avoided walking on the pilings (370).

Petitioner testified at trial before a jury that he slipped and injured his back while carrying the chainsaw on the pilings on the scow (254). The accident occurred on Thursday, October 21, 1982, but Petitioner returned to work the following day. Petitioner worked for the Respondent for approximately one more week when the job was completed (254-257). No medical assistance was requested by the Petitioner at the time of the accident (257).

Petitioner took approximately one (1) week off between jobs and then started to work for a company he identified at trial as "Underpinning". While working in this position, Petitioner re-injured his back on or about December 15, 1982. A prior back injury had been sustained by the Petitioner in 1978 (257-259). The first time the Respondent was informed of the injury of October 21, 1982 was on December 15, 1982 when the Petitioner first requested medical assistance (259-260).

When the Respondent was notified of the accident, they notified their Underwriters. The Underwriters in turn assigned a claims adjuster by the name of Robert Harding to investigate and evaluate the incident (259-260). Mr. Harding subsequently contacted the Petitioner; conducted an investigation of the incident by interviewing the Petitioner

and his co-workers (895-896); arranged to have the Petitioner examined by a physician designated by him (911); arranged for the payment of Petitioner's medical bills; advised him of his rights to retain an attorney to file a claim against the Respondent (902); advised Petitioner of his rights under the maritime law and his rights to recover for pain and suffering (921). Mr. Harding obtained an advance for lost wages for the Petitioner (921).

Mr. Harding had spoken to Petitioner approximately ten (10) times (901). In Mr. Harding's opinion, Petitioner's claim was not a strong one from a liability standpoint (901).

Petitioner received medical treatment from Dr. Silverman a physician of his own choosing when he first received medical treatment (257-258, 807). Dr. Silverman

advised Mr. Harding and the Petitioner that he was free to return to work in April of 1983. Mr. Harding testified that he read to Petitioner the report prepared on behalf of the Respondent by Dr. Balensweig (881-882, 914, 927). Prior to the execution of the general release, Mr. Harding explained the legal ramifications which occur once the general release was executed by the Petitioner.

In response to a specific question concerning the legal effect of signing the general release, Mr. Harding informed the Petitioner and his wife that it would extinguish any further claims against the Respondent (925-926). The general release was signed by Petitioner and his wife on March 23, 1983 (259-261, 919-920).

At the time of the execution of the general release, a draft in the sum of $6,482.00 was given to the Petitioner. The amount of the draft was based upon the estimate of Petitioner's net loss earnings minus advances he had received during the period of disability (457, 904, 919). After the execution of the general release, Petitioner returned to work in April of 1983 (309-310).

The evidence at trial disclosed that the Petitioner re-injured his back in August of 1983 while on vacation (311). On November 16, 1983, Petitioner sustained a further injury to his back (312, 817). At the time the Petitioner re-injured his back in November of 1983 he was employed by Yonkers Construction Co., Inc. (309-310). Subsequent to the injury of November of 1983, Petitioner filled out a pension disability

form with his union. In the report, the Petitioner attributed his permanent disability to the accident of November 16, 1983 and not to the incident of October 21, 1982 while employed by Respondent. At trial, Petitioner claimed his permanency was the result of the accident while employed by Respondent (464 and 1064).

The jury after hearing all of the evidence concerning the Petitioner's prior and subsequent injuries to his back together with the evidence concerning the execution of the general release, found that the Respondent had sustained its burden of proof on this affirmative defense.

The jury was instructed by the district court that issues concerning Petitioner's status and whether Petitioner had established negligence under the Jones Act (46 U.S.C. 688) or unseaworthiness of the

scow need not be determined by them if the factual dispute regarding the general release was established by the preponderance of the evidence by the Respondent (1049).

REASONS FOR DENYING THE PETITION

I

THIS COURT SHOULD NOT WASTE ITS LIMITED RESOURCES REVIEWING A JURY'S FACT BOUND FINDING OF FACT THAT A GENERAL RELEASE IS VALID AND BINDING

Petitioner's argument to this Court is lifted almost verbatim from the brief filed with the circuit court. Petitioner does not address the central issue on the petition to this Court, namely, on what basis should the jury's finding of fact that the general release was valid be overruled or disturbed.

Petitioner argues that this Court's decision in Thompson v. Coastal Oil Co., 221 F.2d 559 (3rd Cir. 1955), rev'd 352 U.S. 862 (1956), mandates a reversal of the jury's findings. This Court in Thompson, supra, re-instated the judgment of the district court, in a non-jury personal injury claim by a

seamen held that a general release was invalid. The Court of Appeals for the Third Circuit had determined in its evaluation of the facts that the general release was valid.

In the present case, all of the relevant factors relating to the validity of the general release were presented to the jury for its consideration based on a proper charge by the district court. The jury was free to make its own determination on the conflicting evidence. A re-trial of the fact bound finding is not appropriate or proper for a petition for certiorari. S.Ct. Rule 10.

The central issue in the litigation in the district court was the validity of the general release. Both parties in their opening statements and summations focused on the issue of the general release (39-69 and

579-645). During trial, counsel for the Respondent had disputed the Petitioner's status as a seamen. In effect, counsel for the Respondent argued that the burden of proof of establishing that the general release was invalid was on the Petitioner. During the charging conference before the case was submitted to the jury, the district court ruled that Respondent had the burden of proof to establish the validity of the general release (670-671).

The leading case in this Court on the issue of a seamen's general release is Garrett v. Moore McCormack Co., 317 U.S. 239 (1942). Garrett holds in relevant part as follows:

> "We hold, therefore, that the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion, and that it was made by the seamen with full understanding of his rights. The adequacy of the consideration and

> the nature of the medical and legal advice available to the seamen at the time of the signing the release are relevant to an appraisal of this understanding" 317 U.S. @ 248.

Respondent introduced evidence on each of the elements prescribed by this Court. At the outset it should be noted that Petitioner's native language was English, that he was a high school graduate and that he had an above average I.Q. (437). Petitioner likewise acknowledged that he understood the meaning of the word "general release" (438) and understood the effect of signing the document (451).

During trial, Petitioner seemed to imply that there may have been some deception in having him execute the general release when Petitioner testified that he thought the general release was a "receipt". Unfortunately for the Petitioner, this position or strategy did not occur to him

until after his pre-trial deposition taken during the discovery process. This is apparent because during the cross-examination of the Petitioner at trial, he conceded that he never used the word "receipt" when referring to the general release during the deposition (441-443). The Petitioner further conceded during the cross-examination at trial that he freely signed the general release in his wife's presence (443). Likewise, Petitioner's spouse testified at trial that she was not coerced into signing the document (112).

The evidence at trial demonstrated that the adjustor explained the legal effect of signing the general release while reading it with them prior to its execution (925-926).

Counsel for the Petitioner continues to maintain that the general release is invalid on its face because it was notarized prior to the Petitioner and his wife executing the document. During trial, counsel conceded that the prior notarization would have no effect on the validity of the general release as Petitioner admitted signing the document (644). Other suggestions have been made in Petitioner's brief concerning the adjustor's failure to advise the Petitioner of his rights under maritime law and the right to retain an attorney. These factual issues are set forth in the appendix (902-903, 921 and 925-926). The adjustor explained to the Petitioner his rights under the Jones Act and the doctrine of unseaworthiness under maritime law (932-933). Any conflict on the aforesaid issues were disputed by the testimony of

Petitioner's wife who acknowledged that the adjustor did mention the Jones Act during her presence (129).

Petitioner's brief at Pages 39 and 40 argues that the general release on its face is invalid because the adjustor did not totally explain to the Petitioner his medical condition prior to signing the general release to include, prognosis. This Court in Garrett stated that the nature of the medical advise available at the time of signing the general release is relevant to an individual's understanding of the effect of signing the document. The record below substantiates that Petitioner received medical treatment and advise from his own physician who determined that the Petitioner could return to work in April of 1983 (881-882). The Petitioner's physician did not diagnose a herniated disc until the accident

sustained by Petitioner while working for Yonkers Construction Co. in November of 1983 and diagnostic tests were conducted (826 and 852-859).

In the interim, the Petitioner sustained at least three (3) subsequent back injuries after October of 1982 (259, 311-312). Respondent's physician testified at trial that Petitioner does not have a herniated disc but rather has a degenerative disc condition which was not the result of trauma (413). Based on this conflicting testimony, the jury was free to decide whether at the time the general release was executed, the Petitioner had available medical advice in order to demonstrate that the general release was freely executed.

Another element raised concerns the availability of legal advice for the Petitioner. The evidence presented to the

jury confirmed that the Petitioner had previously been represented by counsel for various injuries (261-262 and 944-945). It can hardly be argued that competent legal advise was not available to the Petitioner based on his prior history of engaging counsel for prior injuries. Moreover, Petitioner was not a seamen in the traditional sense that he was unable to obtain counsel. Petitioner only worked per diem and returned home every night. The Petitioner was not isolated from obtaining legal advise because he was in fact part and parcel of the land based community.

The Court below readily recognized that questions of fact concerning the validity of the general release must be determined by the jury. This determination is consistent with the decision in this Court and the various circuit court's of appeals. Dice v.

Akron, Youngstown Railroad Co., 342 U.S. 359 (1952); Gifford v. Wichita Falls & S. Ry. Co., 211 F.2d 494 (5th Cir. 1954); German v. Carnegrie-Illinois Steel Corp., 169 F.2d 715 (3rd Cir. 1948); Blake v. W. R. Chamberlin, 176 F.2d 511 (9th Cir. 1949); Scola v. Boat Frances R. Inc., 546 F.2d 459 (1st Cir. 1976); Guerro v. American Hawaiian S.S. Co., 222 F.2d 238 (9th Cir. 1955); see, Annot., 43 A.L.R. 2d 786, 802 (1955).

The final issue raised by Petitioner on the question of the general release deals with the adequacy of the charge by the district court. The trial court quoted verbatim from the Garrett, supra, decision (670-671 and 719-722). The incorporation of Garrett, supra, in the charge by the district court satisfied the requirements of fair play and justice for all parties to the litigation and the jury was free to decide

the issues based on the credible evidence. This Court should deny the petition as there was no basis for granting, in effect, a re-hearing on its prior decision in Garrett, supra.

The Petitioner received a fair trial; district court correctly charged the law relating to seamen's general releases; and this Court is bound by the findings of the jury. Moreover, the judgment order of the circuit court has no binding effect or any precedential value.

II

THE JUDGMENT ORDER BY THE SECOND CIRCUIT DID NOT IN ANY WAY CHANGE THE PRINCIPLES SET FORTH IN TIPTON AND EICHEL

To begin with, the Petitioner's brief quotes out of context the trial testimony concerning the fact whether Respondent's counsel violated the in limine motion. Petitioner's motion was to prevent Respondent's counsel from using the fact that Petitioner was receiving compensation under the Longshoremens Harbor Workers' Compensation Act ("LHWCA") 38 U.S.C. 901 et seq., as evidence of Petitioner's status as a Jones Act seamen. Respondent's counsel consented to the motion only as it related to the status of the Petitioner.

Petitioner at trial argued that he sustained a herniated disc injury because of the accident of October of 1982. Respondent was free to rebut this argument by showing Petitioner's prior and subsequent injuries. This was the precise purpose of the inquiry by Respondent's counsel. The purpose of the inquiry was recognized and approved by the trial court (319-3210.

The only question asked was whether the Petitioner filed a claim with his subsequent employer. Counsel did not inquire as to the amount of compensation received nor that all of his medical bills had been paid (322). Interestingly, the same inquiry was made by Petitioner's counsel on direct examination concerning a prior injury (262).

The purpose of the holdings in Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963) and Tipton v. Socony Mobil Oil Co.,

375 U.S. 34 (1963) was to prevent the admission of collateral source payments to mitigate the plaintiff's damages (Eichel) and to prevent the use of the fact that Petitioner received compensation under LHWCA as evidence of his status under the Jones Act (Tipton). In both Eichel, supra, and Tipton, supra, Petitioner's counsel was attempting to introduce the existence of a compensation claim for the same injury in order to either mitigate the damages or evidence of the Petitioner's status. In the instant case, Respondent's counsel was inquiring about a subsequent injury.

The judgment order of the Second Circuit did not confront the issues raised in the Tipton, supra, and Eichel, supra, cases. The inquiry, at best, was not prejudicial nor harmful to the Petitioner and did not violate any agreements by counsel. The sole

purpose of the inquiry was to advise the jury that the Petitioner sustained a subsequent injury (319-321).

CONCLUSION

FOR THE ABOVE STATED REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED WITH COSTS.

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Respectfully submitted,

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